SUPREME COURT, U. S.

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term
1971

No. 71-1045

FRANZ J. TOMASINO,

Petitioner,

V.

STATE OF CALIFORNIA

PETITIONER'S REPLY BRIEF

ON PETITION
FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Petitioner, in reply to Respondent's Brief in Opposition, alleges that the matter therein presented should be totally disregarded because it is non-responsive to the questions he has raised in his Petition.

An instance in point -

In its Brief, as regards the "question presented", it states:

> "In respondent's view, the sole question is whether the United States District Court acted properly in remanding, on its own motion and without a hearing, a state criminal prosecution (designated People of the State of California v. Tomasino) to the state courts." (underscore in quotation) (Resp.Br.,p.2)

While Petitioner concedes that power exists for a District Court to remand a removed Case ex parte, i.e., on its own Motion. in the matter before this Court, the lower court expressly waived its authority to act ex parte when it ordered the State to respond (Pet.,p.3), thereby changing the status of said removed Case proceeding from an ex parte one, to an adversary one that requires a Hearing (Pet.Br.,pp.10-11).

Obviously, Respondent has not placed before this Court, in any manner, or form, any "opposition" whatsoever to Petitioner's Questions (a), (b), and (c), as set forth on page 4 of his Petition.

Instead, Respondent makes the bald, unsupported, statement, in opening its Argument, on page 3 of its Brief, that -

> "The People submit that petitioner's removal petition was clearly lacking in merit. Accordingly, if it is proper for United States District Courts to remand any cases on their own motions, and without holding of any hearing, this case would be an appropriate one for such action."(underscore in quotation)

What Respondent thus states is petitio principii - fallacious in that what is to be proved is implicitly taken for granted, i.e., the fallacy of assuming,

in the premise, the conclusion that is to be proved!

Thereafter, acting upon its assumption that its statement "that petitioner's removal petition was clearly lacking in merit", Respondent has proceeded to represent to this Court meaningless statistics, insofar as proving or disproving Petitioner's position, drawn from Greenwood v. Peacock, 384 U.S. 808, pertaining to a proliferation of the removal of cases in support of the allowance of "summary remand".

Be that as it may, all of the matter presented on pages 4 through 8, of Respondent's Brief, has thrown neither light nor shadow on the matter that Petitioner has placed before this Court, in his Petition. Respondent has neither proved nor disproved any thing - just a vapid gyration.

Consequently, Respondent's conclu-

sion, on page 8, of its Brief, is a further instance of petitio principii,

> "We submit that, as the claim urged by petitioner has already been rejected by this Court by very clear implication, this case does not present a legal issue warranting grant of certiorari".

Here, without, in any manner, showing that Petitioner's Case, involving, as it does, a situation demanding a Hearing in an adversary proceeding, comes within the sweep of the cited statistics, but presumes that, because his Case was removed from a State court, it automatically comes under the frown of this Court, is totally without merit.

Respondent can not be serious in urging that this Court deny Petitioner certiorari solely upon the "dictum" drawn from Greenwood, supra, and upon nothing more. Herein presented is a a point of constitutional law, i.e.,

the granting or denial, to Petitioner, of "due process of law" secured to him under the 5th Amendment, United States Constitution.

To Petitioner, it appears that a more cogent question, than he has herein set forth, is: Under the Constitution, is the court, after having one side of a Case presented to it, and ordering the opposition thereto, to be permitted to decide the issue "in camera"...within the recesses of his skull?

Petitioner respectfully directs this Court's attention to a fact, ignored by Respondent, that Greenwood, supra, was remanded because the attempted removal thereof was based upon the 1st Amendment, of said Constitution, which this Court ruled that the rights thereunder "are not rights arising under a law providing for 'equal civil rights' within the meaning of §1443(1)".(p.825)

WHEREFORE, inasmuch as Respondent has ~~failed to oppose~~, in any valid manner, Petitioner's Petition for a Writ of Certiorari, he requests that his Petition be granted.

Respectfully submitted,

John N. Frolich-
Attorney for Petitioner